SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 17.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

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BRIEF OF PETITIONER

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Colorado in case No. 17 is reported under the name of *Wolf, et al. v. The People*, 117 Colo. 279; 187 P. (2d) 926.

The opinion of the Supreme Court of the State of Colorado in case No. 18 is reported under the name of *Wolf, et al. v. The People*, 117 Colo. 321, 187 P. (2d) 928.

JURISDICTION.

Jurisdiction exists by virtue of Title 28, United States Code, Sec. 1257 (3).

The Supreme Court of the State of Colorado, being the highest court in said State, has rendered its final judgment and decision in these cases (17 R. 51-56; 18 R. 67-71) wherein a right, privilege and immunity under the Constitution of the United States has been specially set up and claimed by petitioner, to-wit: freedom from unreasonable search and seizure by virtue of the Fourth and Fourteenth Amendments of the Constitution of the United States. (Case No. 17, R. 17, 41, 42, 45, 46, 50, 51; Case No. 18, R. 5-7, 47, 48, 55, 56, 66).

DATES OF JUDGMENTS.

The judgment of the Supreme Court of Colorado in case No. 17 was entered on November 3, 1947 (17 R. 51). Petition for Rehearing was denied December 8, 1947 (17 R. 59). Petition for Certiorari was filed February 14, 1948, and was granted April 26, 1948 (17 R. 60).

In case No. 18, the judgment of the Supreme Court was entered November 24, 1947 (18 R. 67). Petition for Rehearing was denied December 15, 1947 (18 R. 71). Petition for certiorari was filed February 14, 1948, and granted April 26, 1948 (18 R. 73).

CONSTITUTIONAL QUESTION INVOLVED.

The sole question presented is whether or not the Fourteenth Amendment has made the right established by the Fourth Amendment effective against state action—that is, whether the privacy of a citizen is protected from unreasonable search and seizure when the same is perpetrated by state officers acting under state law.

SPECIFICATION OF ERRORS TO BE RELIED ON.

The Colorado Supreme Court erred:

1. In affirming the convictions of petitioner.

2. In holding that the evidence procured by an unlawful search and seizure was admissible against petitioner.

3. In failing to hold that such search and seizure and the use of evidence so obtained deprived petitioner of the protection of the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE.

This brief is filed in behalf of the petitioner in cases No. 17 and No. 18. Record references to case No. 17 will be indicated as 17 R.—— and to case No. 18 as 18 R.——. They will refer to the page numbers of the printed transcript.

Petitioner was charged by informations filed in two separate cases in the District Court of the City and County of Denver with conspiracies to perform an abortion (17 R. 1; 18 R. 1). None of the other alleged co-conspirators joins in this petition.

The cases were tried separately and separate writs of error sued out from the Colorado Supreme Court, but were argued together; and while separate opinions were written, the opinion on the constitutional question in No. 17 (17 R. 54, 55) was adopted by reference as the opinion in No. 18 (18 R. 69). The constitutional question which we are seeking to review is the same in both cases. It appears from the record in both cases that investigators and officers of the district attorney's office, some of whom were attorneys at law, without a search warrant or order of court entered the private office of petitioner, who is a duly licensed and qualified practicing physican, put him under arrest and seized his private books and record (17 R. 11-16; 18 R. 27-29). The books and records contained the names, addresses, and telephone numbers of his patients (17 R. 12; 18 R. 28). These books were taken from the doctor's office and were thoroughly examined by the district attorney's officers and the patients, whose names and addresses appeared in said books, were brought to the district attorney's office and interrogated as to the purpose of their visit to the doctor and as to what ailment they were suffering from (17 R. 14, 15; 18 R. 28).

As a result of the information obtained from the books so seized, followed by an inquisition of the patients, informations were filed against petitioner (17 R. 15). At the trial of each case the investigators and officers of the district attorney's office gave testimony as to how they obtained the books (17 R. 11-15; 18 R. 27-28). The chief investigator testified that he instructed three of the attaches of the district attorney's office, two of whom were attorneys to arrest petitioner (17 R. 11). He ordered them to go to the doctor's office and obtain the records (17 R. 11; 18 R. 28). The deputy district attorney testified that he went to the office of Dr. Wolf and saw the book, referred to as Exhibit "A" in case No. 17 (17 R. 11; offered at 17 R. 9, and admitted at 17 R. 18) and referred to as Exhibit "E" in case No. 18 (18 R. 27; offered and admitted 18 R. 33), which was on the table in the office and that he picked up the book, looked through the book, and it was his conclusion that the book contained the names of patients (17 R. 12). He had no search warrant or other order (17 R. 11). The investigator for the District Attorney testified:

> "At the time we arrested him we had instructions to pick up any evidence that might be pertinent to the case (17 R. 13).
>
> "When we went to Dr. Wolf's office we had no knowledge of Mildred Cairo. Never knew such a person existed. Went to Wolf's office to get his records and to arrest him. After we got to the District Attorney's office we looked through the record and looked up the names of the people in there. We found the name of Mildred Cairo. Then we contacted Mildred Cairo. We made an appointment to see her as a result of the knowledge which we obtained from the book. Then she came to our office and she told us all about it. Then we looked up names of other patients in this book. I don't know how many other names we looked up, possibly ten. We looked at every name in the book. Some names had an address, and some names a telephone number. We didn't know what these people were suffering from. We knew they were patients. They

were women. We went out and contacted these people and went to find out for what purpose they went to Dr. Wolf. We didn't contact all of them. We only contacted those where there were prices stated. We contacted these people and made them come to the District Attorney's office. We didn't know what was the matter with them until they came. The only information we had so far as Miss Cairo was concerned came from the book. The same with all other cases, except Miss Martin's (17 R. 14, 15).

"We got about ten or twelve women in altogether. The information was filed against Dr. Wolf on the information that the District Attorney had from the books." (17 R. 15).

Six women whose names were found in the doctor's book were brought to the district attorney's office and subjected to an inquisition. As to the procedure followed by the district attorney and his officers in the interrogation of these women, we refer to what they said in court:

J. Z. testified under cross-examination as follows (18 R. 32):

"I signed a statement in the district attorney's office.

"I was informed that I could be prosecuted but that if I cooperated that most likely nothing would be done. I gathered this impression from Mr. Humphreys.

"He used the word 'cooperation.' He told me that I had committed a crime and asked for my cooperation.

"Mr. Malach showed me my statement this morning.

"I did not go to the district attorney's office voluntarily. I objected to coming to the district attorney's office, and they said they would send the wagon out, so I said I would come down peacefully. I am not married.

"I was in the district attorney's office for several hours. At first I refused to cooperate, but after two hours I told them my story."

"They threatened to bring me down in the patrol. Again I refused to talk for almost an hour. They told me that I was an accomplice and that I had committed a crime, but they led me to believe that if I cooperated I would not be prosecuted."

M. L. R. testified under cross examination (18 R. 34):

"I didn't voluntarily make a complaint against them. I was taken to the district attorney's office. I was questioned by Mr. Humphreys and two men. They said they wanted me to cooperate with the district attorney. I was scared and nervous."

B. B. testified under cross examination as follows (18 R. 35):

"I was called to come to the district attorney's office by Mr. Humphreys. He informed me that I might be prosecuted. I signed a statement.

"I asked him what would come of all this and he said that he hoped nothing, but that I had been in on it, and that my abortion was a crime."

Petitioner filed motions for the return of his books and records (17 R. 5; 18 R. 5-7) which were denied (17 R. 18; 18 R. 11). The book containing the names of petitioner's patients was offered in evidence by the district attorney (17 R. 9; 18 R. 33), objected to by petitioner (17 R. 9; 18 R. 33), and admitted into evidence (17 R. 18; 18 R. 33).

Petitioner moved to quash the information and for a directed verdict of not guilty on the ground that the information and the action were based on evidence obtained from petitioner in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States (17 R. 17).

Petitioner was found guilty and sentenced to terms in

the State Penitentiary (17 R. 44; 18 R. 55). The judgment of the trial court were affirmed by the Supreme Court of Colorado (17 R. 51, 52; 18 R. 67, 68).

SUMMARY OF ARGUMENT.

Although the specific question has never been decided, the concept of due process developed by this Court necessarily implies freedom from unreasonable search and seizure. The due-process clause of the Fourteenth Amendment requires that actions of state officials shall not violate the basic principles of liberty and justice inherent in our political institutions. Among these basic principles is the protection of a person's privacy from arbitrary governmental interference. Protection against unreasonable search and seizure is "implicit in the concept of ordered liberty" and is therefore covered by the due process clause of the Fourteenth Amendment.

Protection from unreasonable search and seizure is essential to the preservation of other constitutional rights. The exploratory search for evidence is a tool of the despotic police state and has no place in a democratic government. Freedom from search and seizure without a warrant is a basic right of Englishmen dating back to the Magna Charta, and is an essential element of the concept of due process of law.

The search and seizure in this case was unreasonable and violated the due process clause of the Fourteenth Amendment. The use of the books wrongfully seized from petitioner as evidence in the trial of these cases violated the due process clause of the Fourteenth Amendment.

ARGUMENT.

I. *Although The Specific Question Has Never Been Decided, The Concept Of Due Process Developed By This Court Necessarily Embraces Freedom From Unreasonable Search And Seizure.*

This Court has held that the Fourth Amendment, like all other amendments which constitute the federal Bill of

Rights, has no application to the state governments. *National Safe Dept. Co. v. Illinois*, 232 U. S. 58. That decision was made without any consideration of the impact of the Fourteenth Amendment upon the Bill of Rights. Twice this Court has expressly declined to consider whether the Fourteenth Amendment has made the provisions of the Fourth Amendment applicable to the state governments. *Adams v. New York*, 192 U. S. 585, 594; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 551. In *Weeks v. United States*, 232 U. S. 383, there is a dictum to the effect that the limitations of the Fourth Amendment apply only to the federal government and its officials (p. 398). The effect of the due process clause of the Fourteenth Amendment was not considered. However, in its discussion of the reason, origin, and history of the Fourth Amendment, this Court in the *Weeks* case, *supra*, very strongly indicated that the right of privacy is a basic right of the citizen. This Court said:

> "As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. See 2 Watson, Const. 1414 *et seq.* Resistance to these practices had established the principle which was enacted into the fundamental law in the 4th Amendment, that *a man's house was his castle*, and not to be invaded by any general authority to search and seize his goods and papers. Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution

said: 'The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.' 'Accordingly,' says Lieber, in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, 'no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony; and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon.'". (p. 390 of 232 U. S.; Italics added).

A. The due-process clause of the Fourteenth Amendment requires that actions of state officials shall not violate the basic principles of liberty and justice inherent in our political institutions.

It is our position that the concept of due process as it has been gradually evolved by the decisions of this Court necessarily compels protection of one's privacy from governmental oppression.

In *Twining v. New Jersey*, 211 U. S. 78, 99, 100. The Court said:

> "* * * it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. * * * If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of

inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in that chapter of Magna Carta which provides that 'no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land.'"

Speaking of the due-process clause, this Court in *Hebert v. State of Louisiana*, 272 U. S. 312, 316, said:

"The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

In the *Twining* case, *supra* this Court said (p. 101 of 211 U. S.):

"The words due process of law 'were intended to secure the individual from the *arbitrary exercise of the powers of government*, unrestrained by the established principles of private rights and distributive justice.'" (Italics added).

In *Palko v. Connecticut*, 302 U. S. 319, 324, this Court indicated the proper rule for determining the applicability of specific immunities of the Bill of Rights to state governments:

> "On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress * * * or the like freedom of the press * * *, or the free exercise of religion * * * or the right of peaceable assembly without which speech would be unduly trammeled * * * or the right of one accused of crime to the benefit of counsel * * *. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be *implicit in the concept of ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states." (Italics added)

The latest pronouncement of this Court on the question here involved is *Adamson v. People of California*, 332 U. S. 46, 53-54, in which the Court said:

> "The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in Palko v. Connecticut, 302 U. S. 319, 323. It was rejected with citation of the cases excluding several of the rights protected by the Bill of Rights, against infringement by the National Government. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. Palko held that such provisions of the Bill of Rights as were *'implicit in the concept of ordered liberty,'* 302 U. S. at page 325, became secure from state interference by the clause. But it held nothing more." (Italics added)

Apparently, the Court in the Adamson case adopted the formula suggested in the *Palko* case by Justice Cardoza, which in turn follows the principle of the *Twining* case.

B. Freedom from unreasonable search and seizure is "implicit in the concept of ordered liberty."

The question must then be tested by inquiring as to whether or not the right of privacy guaranteed by the Fourth Amendment is "implicit in the concept of ordered liberty." In the *Adamson* and *Twining* cases, the Court held that a state law or constitution which authorizes the district attorney to comment on the failure of an accused to give testimony was not offensive to the due process clause. We believe, however, that those rulings are not persuasive here. In those cases, the Court sustained the validity of state laws authorizing the district attorney to comment on the failure of an accused to testify, but the right of the district attorney to make such comment was established and controlled by general law which was interpreted and applied by a court sitting in judgment with both parties present with the right to be heard, whereas, in the case of an unreasonable search and seizure, the officer perpetrating it acts beyond the bounds of the law and in accordance with his own unbridled whim. In cases where police officers obtain confessions by coercion, it is held to be beyond the pale of due process. *Malinski v. New York*, 324 U. S. 401; *Ward v. Texas*, 316 U. S. 547; *Hysler v. Florida*, 315 U. S. 411; *Chambers v. Florida*, 309 U. S. 227; *Ashcraft v. Tennessee*, 322 U. S. 143; 327 U. S. 274. The seizure of evidence by police officers without warrant violates the due process clause of the Fourteenth Amendment in the same way as does the use of coercion to compel self-incrimination.

The Fourth Amendment was intended to forever abolish general and exploratory searches and seizures under so-called writs of assistance. It was the universal belief of the founders of our government that such practices were odious and utterly incompatible with free institutions.

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental

principles of law, that ever was found in an English law book; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' *Boyd v. United States*, 116 U. S. 616, 625.

This Court has never departed from the above decision. It has been re-affirmed many times. In the recent case of *Harris v. United States*, 331 U. S. 145, 155; this Court said:

> "The dangers to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusory. This Court has always been alert to protect against such abuse. But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable. We conclude that in this case the evidence which formed the basis of petitioner's conviction was obtained without violation of petitioner's rights under the Constitution."

C. Protection against unreasonable search and seizure is necessary to the preservation of other constitutional rights.

The struggle against search and seizure went hand in hand with the struggle for freedom of the press. See Chafee, *Freedom of Speech*, Ch. VI. Long before the American revolution, the security of the English home against unwarranted entry by the King's officers had become a firmly established principle in English constitutional law, as evidenced by the historic words uttered by Lord Chatham:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown; it may be frail, its roof may shake, the wind may blow through it;

> the storm may enter, the rain may enter; but the King of England cannot enter; all his forces dare not cross the threshold of that ruined tenement." (cited in Chafee, *Freedom of Speech*, p. 296).

The importance of this doctrine in the English common law is pointed out in 2 *Story on the Constitution*, page 648:

> "This provision [against unreasonable search and seizure] seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American revolution."

And Stimson in *The Law of Federal and State Constitutions*, page 46, states:

> "It [rule against search and seizure] is, of course, closely conected with the right of a person not to be compelled to give self-criminating evidence, but it has a far broader historical connection, with the general objection of the Englishman to inquisitions, visitatorial expeditions by king or Crown officer, going straight back, indeed, to the great clause of Magna Carta."

General raids and exploratory searches for evidence are a handy weapon for despotic governments. Such odious practices are used to suppress free speech and free press.

The right of free speech and free press is an inherent right of every citizen of the United States. See *Hague v. Committee for Industrial Organizations*, 307 U. S. 496. The Fourth Amendment is a necessary implementation of the basic democratic right of free speech, without which it cannot exist. As already observed, this Court has never been called on to decide the specific question here, but there are numerous statements in the opinions of this Court which

conclusively show that immunity from searches and seizures is of the very essence of liberty, an essential right of free citizenship, and an absolutely necessary limitation on the powers of government. All will agree, of course, that a government may abuse its legitimate functions. This is proven by past and contemporaneous history. It is precisely because a government with unlimited powers oppresses the people, that constitutions were written and certain basic fundamental rights established in the citizenry which even the government can not violate.

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * *, and to direct fishing expeditions into private papers on the possibility that that may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. *Federal Trade Commission v. American Tobacco Co.* 264 U. S. 298, 305-306.

In the instant case a doctor's private records containing the names of his patients were taken from his office.

We quote from the dissenting opinion of Mr. Justice Frankfurter in *Harris v. United States, supra*, at page 163 of 331 U. S.:

> "This is the historic background against which the undisputed facts of this case must be projected. For me the background is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights.

> How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature."

When we quote from dissenting opinions it is on a point concerning which there was no disagreement between majority and minority. In the dissenting opinion of Mr. Justice Murphy in *Harris v. United States, supra.* at page 193 of 331 U. S., it was said:

> "The key fact of this case is that the search was lawless. A lawless search cannot give rise to a lawful seizure, even of contraband goods. And 'good faith' on the part of the arresting officers cannot justify a lawless search, nor support a lawless seizure. In forbidding unreasonable searches and seizures, the Constitution made certain procedural requirements indispensable for lawful searches and seizures. It did not mean, however, to substitute the good intentions of the police for judicial authorization except in narrowly confined situations. History, both before and after the adoption of the Fourth Amendment has shown good police intentions to be inadequate safeguards for the precious rights of man."

From the dissenting opinion of Mr. Justice Jackson in the *Harris* case, *supra,* at page 198 of 331 U. S., we quote:

> "In view of the long history of abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of individual life. *In view of the readiness*

of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment. The fair implication of the Constitution is that no search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate. If these conditions are necessary limitations on a court's power expressly to authorize a search, it would not seem that they should be entirely dispensed with because a magistrate has issued a warrant which contains no express authorization to search at all.

"Of course, this, like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught." (Italics added)

In the *Harris* case, as we read it, the Court divided on the question of contraband property, but there is no division or disagreement on the essential right of privacy.

In *Olmstead v. United States*, 277 U. S. 438, the famous wire tapping case, the majority of the Court held that there could not be a physical search and seizure of something that is intangible, namely, a conversation going over the wire. We are not concerned here with that question because there was a physical search and a physical seizure of the doctor's private books. Mr. Justice Brandeis, in a dissenting opinion, discusses the importance of the Fourth Amendment as a necessary protection for the right of free men:

"The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a

part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

"Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire tapping must, in my opinion be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement." (pp. 478 and 479 of 277 U. S.).

The essential privacy of a doctor's books is forcibly stated by Mr. Justice Brandeis at page 487 of 277 U. S.:

"Telephones are used generally for transmission of messages concerning official, social, business and *personal affairs including communications that are private and privileged—those between physician and patient; lawyer and client, parent and child, husband and wife.*" (Italics added).

In the same dissenting opinion, Mr. Justice Brandeis stated,

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." (page 479 of 277 U. S.).

In *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447, 478-479. This Court speaking through Mr. Justice Harlan said:

> "We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 103 U. S. 168, 190. We said in Boyd v. United States, 116 U. S. 616, 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice Field in In re Pacific Railway Commission, 32 Fed. Rep. 241, 250, 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. *Without the enjoyment of this right, all others would lose half their value.*'" (Italics added)

In *Feldman v. United States*, 322 U. S. 487, 489-490; this Court said:

> "The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined

as they are, and expressing as they do supplementing phases of the same constitutional purpose—*to maintain inviolate large areas of personal privacy.* See Boyd v. United States, 116 U. S. 616, 630. 'The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles [of the Fourth and Fifth Amendments] established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.'" (Italics added)

D. An unreasonable search and seizure is a violation of the due process clause under the rule of Twining v. New Jersey, supra.

1. *Freedom from search and seizure without warrant is a basic right of Englishmen dating back to Magna Charta.*

In *Twining v. New Jersey, supra*, p. 100, the first test of what constitutes due process is stated as follows:

"First. What is due process of law may be ascertained by an examination of those *settled usages and modes of proceedings* existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." (Italics added).

We think that it already appears from this brief that the right of privacy was deeply rooted into the traditions and usages of England before the immigration. Lord Chatham's famous dictum as to the sanctity of a man's cottage is part of the folklore of the English speaking people.

It is thought that the rule in English law against search and seizure without warrant derives from the provisions of Magna Charta (c. 39):[1]

[1]Stimson, The Law of Federal and State Constitutions, p. 46.

> "No freeman shall be taken or imprisoned, or disseised, or outlawed or exiled, or anywise destroyed, nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land." (cited in *Twining v. New Jersey, supra*, p. 100).

The search warrant for stolen goods was of ancient origin. 34 Harv. Law Rev. 362. But Lord Coke held that the practice of issuing search warrants by justices of the peace was contrary to the principles of Magna Charta:

> "For justices of the peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons or stolen goods, is against Magna Charta." Institutes, Bk. 4, pp. 176, 177 cited in *People ex rel Simpson v. Kempner*, 208 N. Y. 16, 20; 101 N. E. 794.

Under the Stuarts the use of search warrants was no longer confined to the recovery of stolen goods, but was perverted to uncover evidence of sedition and treason.[2] This practice was continued until it was struck down by Lord Camden in 1765 in the famous case of *Entick v. Carrington*, 19 How. St. Tr. 1029. It is clear from Lord Camden's opinion that he was enunciating no new principle of law, but rather was sweeping away the refuse of the Star Chamber from ancient constitutional doctrine. In comparing the seizure of stolen goods and the seizure of documentary evidence, he said:

> "'The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality, 4 Inst. 176; and, therefore, if the two cases resembled each other more than they do, *we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.* Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft commit-

[2] Trial of Algernon Sidney for High Treason, 9 How. St. Tr. 818, (1683).

ted. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description . . . ." (Cited in *Boyd v. United States, supra*, p. 628; italics added.)

2. *The rule against search and seizure is substantive and fundamental rather than procedural.*

We turn to the next rule of the *Twining* case, *supra*:

> "Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law." (p. 101 of 211 U. S.)

Under no possible construction can the right against unlawful search and seizure be termed "procedural." In speaking of Lord Camden's judgment in *Entick v. Carrington, supra*, Mr. Justice Bradley said in the *Boyd* case, *supra*, p. 630:

> "The principles laid down in this opinion affect *the very essence of constitutional liberty and security.*" (Italics added).

It is submitted that constitutional liberty cannot be preserved, if the agents of government are permitted to seize a man's private papers without warrant.

> "'Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of so-

ciety." *Entick v. Carrington, supra*, cited in *Boyd v. United States, supra*, (pp. 627, 628 of 116 U. S.).

The rule against search and seizure goes much deeper than a mere matter of procedure. It protects a basic essential right, *the right of privacy*. That right is squarely within the third conclusion of this Court in the *Twining* case, *supra*, which we shall next consider:

3. *The rule against search and seizure is a basic safeguard against arbitrary actions by the government and as such is an inherent feature of the concept of due process of law.*

"Third." But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those *fundamental principles, to be ascertained from time to time by judicial action*, which have relation to process of law, and protect the citizen in his private right, and *guard him against the arbitrary action of government.*" *Twining v. New Jersey*, p. 101 of 211 U.S. (Italics added).

In *Jones v. Securities and Exchange Commission*, 297 U. S. 1, 24, this Court speaking through Mr. Justice Sutherland said:

"The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—*because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy.* Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning." (Italics added).

Mr. Justice Cardozo in his dissenting opinion said:

> "The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely." (p. 32 of 297 U. S.).

An administrative agency or commission exercising judicial powers must proceed in accordance with standards fixed by law; otherwise, its action is violative of due process. That is precisely the reason why a search and seizure without search warrant specifically describing the place to be searched and the person or thing to be seized is an unreasonable search violative of the Constitution. Unless police officers are kept within strict bounds in conducting searches and seizures, their only guide is their free and unfettered will. They may search for such books as their unbridled zeal directs, and they may seize as many as they feel will answer their purpose. They may examine at their leisure private books and records and obtain a list of the physician's patients. They may, as their arbitrary will dictates, seek out any number of patients that they wish and force them to divulge their most intimate affairs. A government of laws means that the citizen will not violate the laws of his government, but it also means that the government will not violate the *rights of its citizens*. When police officers flout the laws of their government, it is anarchy and anarchy always ends in despotism.

In *United States v. Lefkowitz*, 285 U. S. 452, 464, this Court speaking in a unanimous opinion through Mr. Justice Butler said:

> "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible

under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests."

The matter is conclusively settled in the decision of *Johnson v. United States*, 333 U. S. 10, 13, 14:

"The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's home secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

"[To sanction arbitrary search and seizure by police officers] *would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.*" (333 U. S. 17; italics added).

It was held in the *Boyd* case, *supra*, that "any compulsory discovery by extorting the party's oath or compelling the production of his private books and

papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd v. United States*, *supra*, p. 631 of 116 U. S.

And in *Weeks v. United States*, 232 U. S. 383, this Court again classified the rule against search and seizure as a basic element of a constitutional democracy. The Court quoted Cooley's Constitutional Limitations:

> "'The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.'" (232 U. S. 390).

But the right of a citizen to be free from wrongful search and seizure by the federal government is of little value if he may be subjected to arbitrary raids by the officials of the forty-eight state governments.

Abuse of the search and seizure power by local police officers was noted by the President's Committee on Civil Rights as one of the ways in which people of racial minorities are deprived of their civil rights in this country:

> "In various localities, scattered throughout the country, unprofessional or undisciplined police, while avoiding brutality, fail to recognize and to safeguard the civil rights of citizenry. Insensitve to the necessary limits of policy authority, untrained officers frequently overstep the bounds of their proper duties. At times this appears in unwarranted arrests, unduly prolonged detention before arraignment, and abuse of the search and seizure power." *Findings and Recommendations of President's Committee on Civil Rights*, Part II (1).

The fact that the constitutions of every one of the forty-eight states contain provisions guarding against un-

reasonable search and seizure is cogent proof that this basic freedom is "an indispensable need for a democratic society." *Harris v. United States*, 331 U. S. 145, 161, dissenting opinion of Mr. Justice Frankfurter.

That security against arbitrary search and seizure is a basic requirement of a free society is recognized not only by the people of this country, but also by the other democratic nations of the world. The Commission on Human Rights of the United Nations, meeting at Geneva in December, 1947, unanimously adopted (Russia abstaining) a Draft Declaration on Human Rights which contained a comprehensive provision for the protection of the individual's privacy:

> "Article 9. Everyone shall be entitled to protection under law from unreasonable interference with his reputation, his privacy, and his family. His home and correspondence shall be inviolable."[*]

II. *The Search and Seizure in This Case Was Unreasonable and Violated the Due Process Clause of the Fourteenth Amendment.*

We submit that the action of the officers in the instant case was arbitrary in the highest degree, and that petitioner is entitled to the protection of this Court against such arbitrary governmental action by virtue of the due process clause of the Fourteenth Amendment. The search and seizure in this case was not only arbitrary and unreasonable, but shockingly indecent. In several of the cases cited in this brief, the Court was divided on the question of whether the seizure of contraband articles was valid. See *Harris v. United States, supra*, and *Davis v. United States*, 328 U. S. 582. No such question arises here. Ordinary books and records kept by a physician in the course of his professional work have no value to an arresting officer, except as evidence. The search for evidence, unless it is an instrument or fruit of crime, has always been declared to be an unreasonable search within the meaning of the Constitution. See *Gouled v. United States*, 255 U. S. 298, *Davis v. United States*, 328

[*] Preliminary Report by Professor H. Lauterpacht, Commission on Human Rights, Third Session, International Law Association.

U. S. 582, *Zap v. United States*, 328 U. S. 624; *Harris v. United States*, *supra*, and *United States v. Lefkowitz*, *supra*.

The search here was exploratory. The officers said that they were instructed to go down and pick up the records (17 R. 12-14; 18 R. 28). One book was on the table and one book was on the side case (17 R. 12; 18 R. 28, 29). They seized the books, made a partial examination in the office, but continued the examination later (17 R. 14). The books were still the books of the petitioner, although they were in the possession of the officers. The examination of the books made by them after they left the office is part of the same general search that was commenced in the office. So, we have here a general exploratory search designed and intended to obtain evidence. In addition to this, the search was indecent. A thing that is indecent cannot be reasonable. It has rarely happened, if ever, that law officers raided a doctor's office, seized his private records, thoroughly examined them, and then searched out his female patients, one by one, and forced them to expose their most intimate personal affairs.

One is reminded of the story of the sinning woman brought before the Master. The mob cried, "Stone her." The officers in this case, did not believe in physical stoning, but were more refined and modernistic. "Cooperation" was extorted from these helpless women by threatening them with a forced ride in the patrol wagon (18 R. 32).

In the early days of the common law when it became necessary to inquire into the physical condition of a woman prisoner a writ *De Ventre Inspiciendo* was directed to a discreet matron (1 Blackstone Comm. 456). It might be that in a police state, male law enforcement officers would be authorized to conduct a forced inquisition into the intimate affairs of a woman. But in this country when a woman becomes involved in the toils of the law, she is guarded and cared for by officers of her own sex. This case is unprecedented in American Jurisprudence. (See *People v. Martin*, 382 Ill. 192, 46 N.E. (2d) 997, and *People v. Schmoll*, 383 Ill. 280, 48 N.E. (2d). 993). The Supreme Court of Colorado in its opinion states that the privacy that attends

the physician and patient relationship is "solely for the protection of the patient, not the physician." (17 R. 53). But assuming that to be true, nevertheless, the physician is the keeper of his patient's secrets. The patient cannot be protected if police officers have the right to forcibly seize the doctor's books and search out the patients and compel them to reveal the cause of their seeking medical service. However, the distinction is purely technical and cannot affect the substantive right involved. It was the private books of the physician that were searched and seized. We believe that the same cannot be justified on any reasonable theory, legal or moral. The shocking indecency of the entire procedure aggravates the wrong and illustrates the length to which police officers will go when stealthy encroachments on constitutional rights are winked at.

The Supreme Court of Colorado does not minimize the importance of the search and seizure clauses of the Federal and state constitutions:

> "It seems superfluous to add that nothing here or heretofore said by us and nothing contained in any of the numerous decisions of other jurisdictions in support of the rule in the Massantonio case, justifies unlawful searches or seizures. In line with such jurisdictions we have condemned them in the strongest terms and pointed out the proper remedy." (17 R. 55).

The opinion of the Court in No. 17 on the constitutional issue is expressly adopted in No. 18 (18 R. 69). The Massantonio case referred to by the Colorado Court is *Massantonio v. The People*, 77 Colo. 392, 236 P. 1019. In that case the Colorado Supreme Court said:

> "We cannot leave this subject, however, without noticing the following paragraph of the brief of the Attorney General:
>
> 'We feel that the decision on this point is of great importance as it directly affects the powers of the law enforcing officers and if the contention of our opponents is upheld the hands of these officers will be tied and one more technicality will be thrown up to delay and

prevent the apprehension and conviction of criminals. It might be well to observe what would be the effect of such a rule. Evidence secretly and surreptitiously obtained would be inadmissible. Thieves could rest secure in their homes, knowing that it would be next to impossible to be taken by surprise, and the bootlegger would have little fear of a sudden onslaught by the prohibition officers. * * * To hold that the peace officers must advertise both their identity and purpose to the world whenever they attempt to secure evidence is, in our opinion, to put a wholly unreasonable and illegal restriction on their powers.'

"Apparently this frankly and lucidly states the position of those who, under the guise of official authority, without a warrant of search and in defiance of the Constitution of their state, invade without hesitation the homes of its citizens and seize whatever they find which they think may be of use in a criminal prosecution; and we cannot too strongly condemn it. Every officer making an unconstitutional search, and every officer advising or conniving at such conduct is a law violator and a violator of his oath of office and should be held to accountability." (77 Colo. 400; 236 P. 1021).

So it is apparent that the Colorado Court goes right along with this Court in full appreciation of the importance of the citizen's right to enjoy the ordinary privacies of life.

The difference between the Colorado court and this Court as revealed by the respective decisions is that while an unreasonable search and seizure is recognized by the Colorado court to be unconstitutional, yet evidence obtained thereby is admissible because of a common law rule of evidence. This rule we shall hereinafter discuss.

So there is no issue here concerning the character of the search and seizure conducted against petitioner. It was not approved by the Colorado Supreme Court. It could not be approved by any tribunal in a free country.

III. *The Ruling of the Colorado Court That the Books Obtained From Petitioner by a Wrongful Search and Seizure Were Competent Evidence Against Him Is Contrary to the Due Process Clause of the Fourteenth Amendment.*

This Court is not here concerned with the delicate function of passing upon the constitutionality of a state statute claimed to be in conflict with the Federal Constitution. The observation of this Court in *Bridges v. State of California*, 314 U. S. 252, 260; is peculiarly pertinent.

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in Cantwell v. Connecticut, 310 U. S. 296, 307, 308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' [Citing cases]. For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this court has said that 'it must necessarily be found,' as an original question' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.'"

Nearly a century after the adoption of the Fourth Amendment the free people of Colorado re-wrote it word for word in the Constitution of Colorado, (Article 2, Section 7). No statesman, journalist, jurist or citizen has at any time questioned the wisdom of the search and seizure clause, or suggested the slightest modification thereof. At no time since the adoption of the Colorado Constitution did the legislature ever take any action that in the slightest degree evinced an intention to modify the mandatory provision of the Colo-

rado Constitution as to search and seizure. Under the Colorado statutes a warrant authorizing a search and seizure can be obtained only by a sworn complaint.[4]

Let us consider briefly the rule of evidence which the Colorado court relies on. We quote from the decision of the court in the *Massantonio* case, supra, which is relied on by the court in its opinion in this case under the rule of *stare decicis* (17 R. 54):

> "The general principle is thus stated by Greenleaf:
>
> 'Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.' Greenleaf on Evidence (15th Ed.) Vol. 1, p. 348, Sec. 254," (77 Colo. 396; 236 P. 1020).

Greenleaf's rule is also referred to by Mr. Chief Justice Taft in *Olmstead v. United States*, *supra*, in which he quotes *Jones on Evidence*, which authority comments on Greenleaf's rule as follows:

> "Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute" (page 467 of 277 U. S.).

There is a distinction in securing papers or records by *private trespass* and obtaining them by *official maladministration* in direct violation of a constitutional guarantee. This important distinction, the Supreme Court of Colorado, following *Wigmore on Evidence*, completely overlooks. Professor Wigmore completely misconceives the function of the Fourth Amendment. He says the object of the Amendment was to protect the citizen from domestic disturbance by the disorderly intrusion of irresponsible administrative officials.

[4] 1935 C.S.A. Ch. 48, Sec. 431; 1935 C.S.A. Ch. 89, Sec. 45; 1935 C.S.A. Ch. 48, Sec. 219, and 1935 C.S.A. Ch. 48, Sec. 252.

(8 *Wigmore on Evidence* 35 (3rd ed.)). If this were so, nice officers with polished manners and gentlemanly bearing could violate the Constitution with impunity. The Fourth Amendment was designed to protect the citizen against *government oppression* and not *private trespass*. The entire Bill of Rights is directed against the government and not against the private citizen, but in his behalf and for his benefit. Wigmore's argument to the contrary is puerile dialectics.

The Colorado Court further quotes from Wigmore, referring to his illustration of the infernal machine (77 Colo. 397, 236 P. 1020). But the remote possibility that someone may have an infernal machine could not justify the unlawful search of one who, for example, might be suspected of possessing a bottle of illicit liquor. Hyperbole serves a useful purpose as a figure of speech, but is out of place in the adjudication of human rights. The Supreme Court of Missouri comments on Professor Wigmore's argument:

> "Prof. Wigmore thus characterizes that argument: 'All this is misguided sentimentality.' The state copies that cynical characterization. We think Prof. Wigmore in his essay has not shown his usual logical force and clearness.
>
> "If the rule obtains that an officer may enter any house and search any person any place without a warrant or knowledge; if he, vain-gloriously sensible of the little brief authority with which he is invested, is encouraged to arrest and search because he suspects some one of some unknown crime and is rewarded according to his success in discovery, encouraged to hunt and ferret on a chance of hitting upon something suspicious, *a system of espionage would ensue characteristic of those countries where the sanctity of the home and inviolability of the citizen are unknown and official interference in those matters is the common experience.*
>
> "It is an incident of every reform that enthusiasts, without experience, and with rapt vision of a glorious result, forget or ignore the limit of legitimate method, disdain conventional restraints and regular

processes, through which alone permanent progress can be achieved. It is a state of mind which causes violent reaction rather than steady progress toward the end desired. It is for the courts, where their offices are invoked, to temper excess by enforcing the restraints which the law imposes for the peaceful orderly conduct of affairs. The lack of discrimination arising from this enthusiasm is illustrated by this argument of Prof. Wigmore's:

"'If officials illegally searching come across an infernal machine planned for the city's destruction and impound it, shall we assume that the diabolical owner of it may appear in court and demand its return and be ordered by the court restitution with perhaps an apology for the 'outrage'?"

"Here is a hapless confusion of claim to property with admissibility of evidence. Violence of statement is not force of reasoning. We are concerned with evidence in a misdemeanor case, and it is beside the question to talk of arson, murder, and treason." (Italics added). *State v. Owens*, 302 Mo. 348, 378, 379, 259 S. W. 100, 109.

The following from Professor Wigmore's argument should also be noted:

"Meanwhile, the heretical influence of Weeks v. United States spread, and evoked a contagion of sentimentality in some of the State Courts inducing them to break loose from long-settled fundamentals.

"In this last period, most of the effect may be ascribed to the temporary recrudescense of *individualistic sentimentality for freedom of speech and conscience*, stimulated by the stern repressive war-measures against treason, disloyalty and sedition, in the years 1917-1919. In a certain type of mind, it was impossible to realize the vital necessity of temporarily subordinating the exercise of ordinary civic freedom during a bloody struggle for national safety and existence. In resistance to these war-measures, it was nat-

ural for the misguided pacifistic or semi-pro German interests to invoke the protection of the Fourth Amendment. Thus invoked and made prominent, all its ancient prestige was revived and sentimentality misapplied. In such a situation, the always watchful forces of criminality, fraud, anarchy, and law evasion perceived the advantage and made vigorous use of it. After the enactment of the Eighteenth Amendment and its auxiliary legislation, prohibiting the sale of intoxicating liquors, a new and popular occasion was afforded for the misplaced invocation of this principle; and the judicial excesses of many Courts in sanctioning its use give an impression of easy complaisance which would be ludicrous if it were not so dangerous to the general respect for law and order in the community.

"No doubt a stage of saturation had to be reached before this period of misuse of the Fourth Amendment could come to a close." (8 *Wigmore on Evidence*, pp. 32-34; 3rd ed.) (Italics added).

A law writer who talks about freedom of speech and freedom of conscience as mere "individualistic sentimentality" betrays a complete misunderstanding of the indispensable rights of a democracy. At the time Professor Wigmore wrote, the epochal decisions in *Near v. Minnesota*, 283 U. S. 697; *Lovell v. City of Griffin*, 303 U. S. 444, *Thornhill v. Alabama*, 310 U. S. 88; and *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, had not been written.

It suffices to say that at no time since the independence of the United States was established has freedom of speech and conscience been regarded as mere "individualistic sentimentality." Therefore, Wigmore's approach to the constitutional problem here involved is definitely wrong and it is inevitable that his conclusion is wrong. Then there is the argument of necessity,—that is, that the basic constitutional rights may be ruthlessly violated to the end that the criminal code may be enforced. In the recent case of *United States v. DiRe*, 332 U. S. 581, 595, we find a sufficient answer to this argument:

"We meet in this case, as in many, the appeal to necessity. It is said that if such arrest and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

And in *Weeks v. United States*, *supra*, (232 U. S. 383, 393) it was said:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

If the right to privacy against unreasonable search and seizure is protected by the Fourteenth Amendment, it necessarily follows that the vindication of that right is within the federal power. This Court has completely rejected the idea advanced by the Colorado Supreme Court that a civil suit for damages is the only remedy, and it has consistently ruled that evidence obtained by an unlawful search and seizure cannot be availed of by the government. In *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 391, this Court said:

"The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain

its right to avail itself of the knowledge obtained by that means, which otherwise it would not have had.

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. [Citing cases]. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

See also *Weeks v. United States, supra, Olmstead v. United States, supra,* and *Johnson v. United States, supra.* In *Trupiano v. United States,* 334 U. S. .....; 68 S. Ct. 1229, decided by this Court on June 14, 1948, this Court held that even contraband liquor could not be seized without warrant where it is practicable to obtain a warrant.

In the case at bar no warrant could be obtained for the reason that no judge or magistrate would issue a warrant directing that a doctor's private books and records be searched and seized. Further, the officers could not make an affidavit describing the books or records which they wanted to seize because it was necessary that they first make a search in order to find that which they wanted. In a dissenting opinion Mr. Justice Wiest in *People v. Case,* 220 Mich. 379, 404; 190 N.W. 289, 297, 298, makes this pertinent observation:

"Suppose an officer scans the information he has and finds it insufficient to obtain a warrant and goes ahead without a warrant, shall the test of the lawfulness of his act be had without any reference to the provision, with the requirements of which he knew he could not lawfully comply? It is absurd to think of such a thing. The argument that if the officer finds the defendant in possession of intoxicating liquor this constitutes probable cause for making the search was urged over a hundred years ago and disallowed by the English courts."

"If no such warrants can be issued can any police officer act as though he had a general warrant. Most emphatically no. What earthly sense is there in outlawing general warrants and then permitting police officers to act as though they had a general warrant? No law, common or statute, can give police officers general power of search and seizure."

The opinion from which the above excerpts are taken is very instructive, both from a historical and legal viewpoint.

In the *Palko* case, *supra*, Mr. Justice Cardozo said that "ordered liberty" was implicit in the concept of due process. Order necessarily means law, a rule of conduct, an established principle which is applied to concrete situations by someone exercising the functions of a magistrate or judge. But as already observed, in the case of search and seizure without magisterial intervention, the raiding officers are a law unto themselves. The absolute necessity of the intervention of magisterial authority is forcibly stated in *Johnson v. United States, supra*, and *United States v. Lefkowitz, supra*.

A long time ago it was stated that laws are made for men and not men for the law. This is especially true of the Bill of Rights. The Fourth Amendment protects the citizen against the Federal Government. It is equally important that the citizen be protected against the tyranny and oppression of state governments. It matters little whether

the invasion of a man's freedom is directed by federal officers or state officers; therefore, the Fourteenth Amendment with its guarantee of due process was inevitable. The Fourteenth Amendment is the complement of the Bill of Rights, and together they constitute the American Magna Charta of human rights.

Respectfully submitted,

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